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# The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management

Patricia A. Renovitch

# THE FLORIDA ENVIRONMENTAL PROTECTION ACT OF 1971: THE CITIZEN'S ROLE IN ENVIRONMENTAL MANAGEMENT

Visible environmental decay has prompted an increased national awareness of ecological problems.[1] Those problems are particularly acute for citizens of Florida. The rapid influx of new residents threatens to upset the delicate balance of the state's fragile environment.[2] The gravity of the situation apparently is appreciated by most Floridians; recent surveys indicate that environmental preservation is a primary concern of the electorate.[3]

In response to this increased public awareness, legislation designed to forestall environmental deterioration has been enacted by lawmakers throughout the nation.[4] The Florida Legislature has reacted in a similar fashion.[5] Moreover, the 1968 revision of the Florida constitution adopts as state policy the protection and conservation of natural resources and scenic beauty.[6] It might be said that the legal system has begun to recognize a new right, the right of citizens to a clean and healthful environment.[7]

The enactment of appropriate legislation, however, is not the ultimate answer to environmental degradation. Unenforced laws are ineffective laws. Because environmental legislation typically entrusts enforcement to administrative agencies,[8] vested with important powers

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1. *See, e.g.*, Hoffman, *Environmental Politics—The Deciding Factor*, 46 FLA. B.J. 576, 579 (1972); Commoner, *Damaged Global Fabric*, in OUR WORLD IN PERIL: AN ENVIRONMENT REVIEW (S. Novick & D. Cottrell eds. 1971). *See generally* R. CARSON, SILENT SPRING (1962).

2. Florida is one of the fastest growing states in America with an influx of 4,500 people per week. P. Meyers, A Slow Start in Paradise vii-viii, February 1974; F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 18 (1973). Furthermore, the ecological balance in the state is already delicate. *See id.* at 17-18; P. Meyers, *supra* at 10-12; Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANNUAL 103, 104-07. *See generally* W. MCCLUNEY, THE ENVIRONMENTAL DESTRUCTION OF SOUTH FLORIDA (1971).

3. A statewide study conducted in March 1974 by Cambridge Survey Research, for the Florida Defendants of the Environment, Inc., and the Florida Audubon Society, found that 59% of Floridians felt that environmental concerns were the most important problems facing Florida today. This percentage of environmentally concerned citizens is significantly higher than in any other state, including California.

4. *See, e.g.*, F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL *passim* (1971). *See also* 33 U.S.C. §§ 1251-376 (Supp. 1972); 42 U.S.C. §§ 4321-35 (1970).

5. *See, e.g.*, FLA. STAT. chs. 380, 403 (1973).

6. *See* FLA. CONST. art. II, § 7.

7. *See, e.g.*, ILL. CONST. art. XI, § 2.

8. *See, e.g.*, FLA. STAT. §§ 253.03, 403.061 (1973).

and wide discretion to exercise that power,[9] an agency diligently discharging its obligation to protect the environment can foster prudent environmental management. On the other hand, if an agency declines to enforce the law, delegated power and discretion can become serious obstacles to the efforts of concerned citizens seeking to compel enforcement.

The recent Florida Supreme Court decision in *United States Steel Corp. v. Save Sand Key, Inc.*,[10] upholding the strict standing requirements of the "special injury" rule, reflects the futility of public nuisance actions initiated by private citizens to abate environmental impairment or to enforce environmental legislation. *Save Sand Key* therefore seems to compel exploration of other avenues for bringing polluters before the courts. At least three alternatives to common law nuisance actions have been suggested by commentators;[11] of the three, only environmental protection legislation is a viable alternative in Florida at this time. If citizens are to join in furthering Florida's constitutional policy of environmental protection, and if citizens are to enjoy access to the courts to redress injuries resulting from environmental destruction, as guaranteed by the constitution,[12] then the Environmental Protection Act (EPA) must be the vehicle.

This note will discuss briefly the inadequacies of the common law nuisance remedy in environmental litigation. Primary consideration then will be given to the grant of standing conferred by Florida's EPA, and to the potential effectiveness of that statutory grant as a means of providing access to the courts, which frequently has been foreclosed by traditional public nuisance doctrine.

## I. Citizen Standing Before the 1970's

The common law doctrine of nuisance evolved in thirteenth century England as a remedy for the wrongful interference with the use and enjoyment of land.[13] The common law recognized two forms of nuisance—private and public. Public nuisance can be distinguished from private nuisance by the class of people affected. Private nuisance, a civil wrong, involves interference with the property rights of a limited

9. *See* Yonge v. Askew, 293 So. 2d 395, 399-400 (Fla. 1st Dist. Ct. App. 1974) (recognizing broad discretion in the Trustees of the Internal Improvement Trust Fund).

10. No. 44,402 (Fla. June 12, 1974); *see* note 18 and accompanying text *infra*. For a discussion of the special injury rule see notes 17-21 and accompanying text *infra*.

11. The three alternatives are: an action based on the public trust doctrine, *see* pp. 740-42 *infra*; according standing to natural objects, *see* p. 742 *infra*; and an action based on environmental protection acts. *See, e.g.*, Fla. Stat. § 403.412 (1973).

12. Fla. Const. art. II, § 7.

13. *See* C. Haar, Land-Use Planning 104-05 (1971); W. Prosser, The Law of Torts § 86 (4th ed. 1971).

number of individuals.[14] Public nuisance, originally a criminal offense, affects the public at large.[15] Therefore, since public nuisance injures the public generally, public agencies historically were entrusted with protecting the environment by enjoining such nuisances.[16] Private citizens were denied a judicial hearing to abate public nuisances unless they could show "peculiar injury . . . different in kind and not merely in degree from the injury to the public at large."[17] Judicial recognition of this so-called "special injury" rule[18] has had the effect of denying

14. W. PROSSER, *supra* note 13, § 86.

15. *Id.*; *see* Prior v. White, 180 So. 347 (Fla. 1938).

16. W. PROSSER, *supra* note 13, § 86; *see* C. HAAR, *supra* note 13, at 138-55.

17. Brown v. Florida Chautauqua Ass'n, 52 So. 802, 804 (Fla. 1910).

18. *See* Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572, 573 n.3 (Fla. 2d Dist. Ct. App. 1973), *rev'd*, No. 44,402 (Fla. June 12, 1974).

In *Save Sand Key*, *supra*, the Second District Court of Appeal specifically rejected the special injury rule. Appellant Save Sand Key, Inc., a nonprofit citizens' group, sought to enjoin U.S. Steel from interfering with certain alleged vested rights of its members in a portion of the soft-sand beach of Sand Key, a gulf-front island in Pinellas County. These rights were claimed to have been acquired by prescription, implied dedication or general and local custom. The group also sought injunctive relief from an alleged "public nuisance in the form of purpresture [*i.e.*, a barrier] blocking enjoyment of those rights." *Id.* at 573. The court also recognized the existence of vested prescriptive rights in the public to use a portion of the soft-sand beach, relying on a similar holding in City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. 1st Dist. Ct. App. 1972), *vac'd*, 294 So. 2d 73 (Fla. 1974). *See* 281 So. 2d at 577. The trial court had dismissed Save Sand Key, Inc., from the suit " 'with prejudice' for the reason that it 'lacks standing' to sue." 281 So. 2d at 573 (discussing unreported opinion of trial court). The trial court had relied expressly on Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. 1st Dist. Ct. App.), *cert. dismissed*, 200 So. 2d 178 (Fla. 1967). *See* 281 So. 2d at 573.

In reversing the trial court's dismissal, Judge McNulty of the Second District Court of Appeal noted that the special injury rule resulted in many a "right" going without protection: "[I]t developed that if almost any injury was suffered jointly with the public a single citizen so victimized could not be heard to complain unless his injury was special in that it differed in kind and degree from the public's." *Id.* at 574. Judge McNulty observed that it is an "anathema to any true system of justice to proclaim that a right may be enjoyed by all yet none may protect it." *Id.* Except in strictly nuisance cases, he noted, the approach to standing both in Florida courts, *see, e.g.*, cases cited *id.*, and in the United States Supreme Court has been liberalized. *Id.* at 574-75. *See also* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971). Furthermore, the court felt that the special injury rule contravenes FLA. CONST. art. I, § 21, which provides that the courts "shall be open to every person for redress of any injury." The court's interpretation of art. I, § 21, is not unique. Several Florida decisions have construed § 21 to provide greater access to the courts than was guaranteed by the more restrictive language of FLA. CONST. Decl. of Rts. § 4 (1885). The following decisions have cited § 21 as a basis (though not necessarily the sole basis) for granting access to the courts: Yordon v. Savage, 279 So. 2d 844 (Fla. 1973) (mother as well as father has a cause of action for damages as a result of injury to son); Garner v. Ward, 251 So. 2d 252 (Fla. 1971) (allowing intervention in wrongful death suit by decedent's first wife); Gates v. Foley, 247 So. 2d 40 (Fla. 1971) (wife of injured husband has cause of action for loss of consortium); Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th Dist. Ct. App. 1972), *rev'd*, 291 So. 2d 593 (Fla. 1974)

standing to private citizens who wish to litigate alleged environmental impairment and destruction. The rule evolved because of the judiciary's fear that a multiplicity of environmental suits would constitute a greater evil than would the continued existence of most nuisances.[19] Moreover, since the authority to bring environmental actions has important economic and political consequences public agencies sometimes are reluctant to share this power.[20] As a result, injustices to both private citizens and the general public have occurred: destruction and impairment of the environment have gone unchecked when the responsible agencies have failed to act.[21]

Public awareness of and concern for a stable environment peaked in the late 1960's.[22] As Americans became environmentally conscious, they grew intolerant of administrative agencies that were failing to protect the public interest in a healthful environment.[23] Even the

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(rejecting "impact rule" in personal injury actions); Leonard v. McIntosh, 237 So. 2d 809 (Fla. 4th Dist. Ct. App. 1970) (accused denied speedy trial entitled to seek a writ of prohibition against judge).

Judge McNulty then declared that "it's time to say . . . that the 'special injury' concept serves no valid purpose in the present structure of the law and should no longer be a viable expedient to the disposition of [nuisance] cases." 281 So. 2d at 575. The judge rejected the argument that "multiplicitousness" is a valid danger. *Id.* The court also noted the deterrent effects of the great expense of litigation, res judicata and the judiciary's ability to screen out spite suits. *Id.* The opinion concluded by rejecting the special injury rule and formulating a new general rule for standing:

> [A] person who is entitled to enjoyment of a right or who directly and personally suffers or is about to suffer an injury may sue for relief or redress whether or not such right or injury is special to him or is shared in common with the public generally.

*Id.* at 577.

Despite the appeals court's well reasoned opinion, the Florida Supreme Court reversed. United States Steel Corp. v. Save Sand Key, Inc., No. 44,402 (Fla. June 12, 1974). The high court criticized the appeals court for not certifying the question to the supreme court and upheld the special injury rule. *Id.* The *Save Sand Key* decision relies on and reaffirms the holding in Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. 1st Dist. Ct. App.), *cert. dismissed*, 200 So. 2d 178 (1967). Therefore, the special injury rule clearly retains vitality in public nuisance actions in Florida.

*But see* FLA. STAT. §§ 60.06, 823.05 (1973), which permit private citizens standing to protest *certain* nuisances and require no special injury. *See* National Container Corp. v. State *ex rel.* Stockton, 189 So. 4 (Fla. 1939).

19. *See* Jacksonville, T. & K.W. Ry. v. Thompson, 16 So. 282, 283 (Fla. 1894); Garnett v. Jacksonville, St. A. & H.R. Ry., 20 Fla. 889 (1884).

20. *See* Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572, 574-75 (Fla. 2d Dist. Ct. App. 1973), *rev'd*, No. 44,402 (Fla. June 12, 1974).

21. *Id.*; *see* Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004, 1004-06 (1972); Hoffman, *Environmental Politics—The Deciding Factor*, 46 FLA. B.J. 576, 577 (1972).

22. *See* Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEORGETOWN L.J. 153, 154-59 (1972).

23. *See* Hoffman, *supra* note 21, at 576-77.

passage of federal and state statutes to protect the air, water and natural resources, however, did not ensure that reluctant public officials would exercise their authority to enjoin violations.[24] As a result of this reluctance, private citizens endeavored to find ways to more actively involve the judiciary in environmental protection.

The "special injury rule" proved to be a formidable deterrent to a successful action founded on common law public nuisance;[25] plaintiffs, therefore, have been forced to resort to other legal theories in order to have their grievances heard in court. One suggested approach involves broadening the historically narrow scope of the "public trust doctrine."[26] This doctrine requires that the submerged sovereignty lands[27] of the state be protected and held in trust for the public.[28] By analogy the doctrine could be extended to all of the state's natural resources. Under the public trust doctrine, the Trustees of the Internal Improvement Trust Fund may be sued if their actions fail to comport with the Trustees' duty to protect the public interest in submerged land.[29] Extension of this doctrine could provide a cause of action against a governmental agency that had failed to discharge its duty to protect the public interest in any natural resource of the state.[30]

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24. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 473-74 (1970).

25. *See* United States Steel Corp. v. Save Sand Key, Inc., No. 44,402 (Fla. June 12, 1974).

26. For discussion of the evolution of the doctrine, see Sax, *supra* note 24, at 473-90; Hoffman, *supra* note 21, at 578-79.

27. *See* Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where Is the Boundary?*, 1 FLA. ST. U.L. REV. 596 (1973).

28. *See* FLA. CONST. art. X, § 11; FLA. STAT. § 253.02 (1973); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892); State v. Black River Phosphate Co., 13 So. 640, 646 (Fla. 1893); Sax, *supra* note 24; Note, *Conveyances of Sovereign Lands Under the Public Trust Doctrine: When Are They in the Public Interest?*, 24 U. FLA. L. REV. 285 (1972).

29. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); State v. Black River Phosphate Co., 13 So. 640, 645 (Fla. 1893); Note, *supra* note 27, at 596-99.

30. When the state holds land in trust for the people of the state and the state violates that trust by failing to protect such publicly owned lands, the public trust doctrine provides the people of the state with a cause of action to enforce the trust. *See* Sax, *supra* note 24; Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories To Control Pollution*, 16 WAYNE L. REV. 1085, 1123 (1970). Historically, the scope of the public trust doctrine has been narrow, limited to such land as parklands or land below the mean high-water mark. Sax, *supra* note 24, at 556; Note, *supra* note 27, at 600-03. The Florida constitution, as revised in 1968, incorporates the public trust doctrine in art. X, § 11: "Sale of . . . [sovereignty] lands may be authorized by law, but only when in the public interest." *See* Note, *supra* note 27, at 598-99.

The general trend in the United States is to prohibit by statute the sale of trust lands to private interests. *See* Sax, *supra* note 24, at 548. For example, Florida statutorily mandates that sovereign lands be held in trust for the public by the Trustees of the Internal Improvement Trust Fund. Furthermore, such lands cannot be conveyed unless the Trustees determine that the sale is in the public interest. *See* FLA. STAT. § 253.12 (1973);

Such an application of the doctrine seems logical; the Trustees' "fiduciary duty" with respect to submerged land seems no more sacred than, for example, the duty of the Department of Pollution Control to protect the air and water quality of the state.[31] Agency actions that affect natural resources other than submerged lands and are contrary to the public interest should give rise to a cause of action just as readily as do detrimental decisions that affect submerged lands. The two causes of action seem distinguishable only with respect to historical precedent[32] and the name of the agency charged with the trust.[33]

It seems anachronistic to limit the application of the public trust doctrine to sovereignty lands alone. Many agencies hold natural resources in trust for the public;[34] extension of the public trust doctrine to all those resources would enable the beneficiaries of this trust, the citizens, to sue when the duty to protect the public interest is breached.[35] The courts could promote reasonable management of the environment by ensuring that decisions reached by regulatory agencies comport with the duty to act for the benefit of the public. Administrative decisions that the courts find unsupportable could be remanded to the appropriate agency with instructions to provide further information justifying its decision.[36] The fact remains, however, that no

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Sax, *supra* note 24, at 548-50. These statutory standards ensure "the availability of a record for review," insulate "agencies from pressures which might otherwise be placed upon them" and restrain "excessive localism in dealing with resources." *Id.* at 550.

Sax persuasively argues that the public trust doctrine should be broadened to apply to any publicly held resources. *See id.* at 473-508. He concludes that the

> fundamental function of courts in the public trust area is one of democratization . . . . When a claim is made on behalf of diffuse public uses, courts take the first step in the process by withdrawing the usual presumption that all relevant issues have been adequately considered and resolved by routine statutory and administrative processes.

*Id.* at 561.

31. *See* FLA. STAT. §§ 403.011-.411 (1973).

32. *See* notes 17-21, 26-30 *supra*.

33. *See* FLA. STAT. ch. 253 (1973).

34. *See, e.g.*, FLA. STAT. §§ 161.041, 403.061 (1973).

35. *See* Sax, *supra* note 24, at 557-65.

36. One commentator has emphasized the effect of judicial remand of agency decisions:

> I have said that this concept of increased participation is the most significant contribution of the judiciary. The reason is that it goes to the very structure of the administrative process. The great limitation, as we have seen, of the administrative process is that in many cases it is unrepresentative. Permanently organized interests . . . are overrepresented . . . .

Jaffe, *Ecological Goals and the Ways and Means of Achieving Them*, 75 W. VA. L. REV. 1, 20 (1972). *See also* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

Florida court has extended the public trust doctrine beyond its present limits.

Another proposed method of encouraging prudent environmental management is to confer standing on "natural objects" in the environment.[37] Like the suggested extension of the public trust doctrine, this proposal has not won many adherents.

Still a third means of involving the judiciary in environmental protection is the enactment of legislation providing private citizens with standing to initiate environment-related suits. Statutory standing can make the courts more readily accessible to plaintiffs seeking to compel governmental and private compliance with environmental laws.[38] Environmental protection acts[39] in eleven states[40] provide statutory standing and, if those provisions are construed liberally by the courts, the need to expand the public trust doctrine or to grant standing to natural objects may be obviated.

The remainder of this note, therefore, will consider in some detail the potential scope of, and possible obstacles to, the use of legislatively established standing to prompt an increased judicial role in environmental protection. The significance of this judicial role should not be underestimated; legislation enacted to protect the environment is meaningless if those charged with enforcing the law fail in their duty. Of course, any of the suggested methods for increased judicial review of environmental regulation might be frustrated by the judiciary's reluctance to interfere with administrative agency decisions.[41]

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37. C. STONE, SHOULD TREES HAVE STANDING? (1974). "I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment—indeed, to the natural environment as a whole." *Id.* at 9. Since corporations, municipalities and universities have standing, the idea is not novel. *Id.* at 10, 17.

38. Sax & Conner, *supra* note 21, at 1004-05.

39. The names of the various acts that legislatively extend standing to environmentally concerned plaintiffs vary somewhat from state to state. Most, however, are titled, "Environmental Protection Act." This Note will use Environmental Protection Act (EPA) when discussing this type of legislation despite the fact that the actual titles vary in some cases.

40. As of July 1974 the following statutes granted standing to individuals in environmental litigation: ARK. STAT. ANN. § 82-2712(d) (Supp. 1973); CAL. HEALTH & SAFETY CODE § 39077.7 (West 1973); COLO. REV. STAT. ANN. § 66-34-12 (Perm. Cum. Supp. 1971); GA. CODE ANN. § 45-142 (Supp. 1973); ILL. ANN. STAT. ch. 111½, § 1002(a)(v) (Smith-Hurd Supp. 1974); IND. ANN. STAT. § 13-6-1-1(a) (Burns code ed. 1973); MASS. GEN. LAWS ANN. ch. 214, § 10A (Supp. 1974); MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1974-75); MINN. STAT. ANN. § 116B.03 (Supp. 1974); NEV. REV. STAT. §§ 41.540-.570 (1973). Illinois also provides in its constitution for standing to challenge environmental destruction. *See* ILL. CONST. art. XI, § 2.

41. Some reluctance is, of course, appropriate because most administrative agencies possess a degree of expertise and familiarity with the case which the court lacks. *See* 1972 WISC. L. REV. 934, 941.

That reluctance must be overcome, however, because the courthouse is at least one step removed from political and economic influences that traditionally have affected administrative decision-making.

## II. Present Environmental Protection Acts

### *A. Statutory Comparison*

The legislative establishment of standing for private citizens to litigate environmental issues is a relatively recent phenomenon. Because of the recent genesis of environmental protection acts, the construction and interpretation of such legislation is not well settled. Therefore it is helpful to examine and compare the various state statutes and case law in order to delineate the possible scope of Florida's EPA.

Since environmental protection acts in other states[42] have been in effect only since 1971, reported cases interpreting those acts have been decided only recently. The acts can be characterized and distinguished by the scope of standing conferred, the cause of action established and the remedies provided.

About half of these new acts limit standing to "citizens" or residents of the state.[43] Indiana, for example, expressly grants standing to "any citizen of the state."[44] Massachusetts, on the other hand, requires that ten citizens join as plaintiffs before standing can be asserted.[45] The requirement of state citizenship undoubtedly is a response to the fear of a multiplicity of suits; additionally, the requirement ensures that the suit involves some local interest.[46] Other state acts are more liberal and confer standing on any "person." Michigan's act provides that "any person . . . may maintain an action . . . for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."[47] Similarly, Colorado's act states that "[a]ny person may initiate an action."[48]

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42. Ark. Stat. Ann. § 82-2701 (Supp. 1973); Cal. Health & Safety Code §§ 39077-79.6 (West 1973); Colo. Rev. Stat. Ann. §§ 66-34-1 to -14 (Perm. Cum. Supp. 1971); Ill. Ann. Stat. ch. 111½, §§ 1001-07 (Smith-Hurd Supp. 1974); Ind. Ann. Stat. § 13-6-1-1 (Burns code ed. 1973); Mich. Comp. Laws Ann. § 691.1201 (Supp. 1974-75); Minn. Stat. Ann. §§ 116B.01-.13 (Supp. 1974).

43. Fla. Stat. § 403.412(2)(a) (1973); Ind. Stat. Ann. § 13-6-1-1(a) (Burns code ed. 1973); Mass. Gen. Laws Ann. ch. 204, § 10A (Supp. 1974-75); Minn. Stat. Ann. § 116B.03 (Supp. 1974); Nev. Rev. Stat. §§ 41.540-.570 (1973).

44. Ind. Stat. Ann. § 13-6-1-1(a) (Burns code ed. 1973); *cf.* Minn. Stat. Ann. § 116B.03 (Supp. 1974), which provides standing to "[a]ny person residing within the state."

45. Mass. Gen. Laws Ann. ch. 214, § 10A (Supp. 1974-75).

46. *See* notes 177-79 and accompanying text *infra*.

47. Mich. Comp. Laws Ann. § 691.1202 (Supp. 1974).

48. Colo. Rev. Stat. Ann. § 66-34-12 (Perm. Cum. Supp. 1971).

Perhaps the most interesting question presented by these state acts is whether standing is conferred on nonprofit corporations, such as the Audubon Society or the Sierra Club. The courts' resolution of this question will have important practical consequences. The economics of litigation make the courts unavailable to the vast majority of private "citizens" and "persons."[49] Therefore, if concerned corporations and associations are not afforded standing, many potential plaintiffs, for all practical purposes, will be barred from pressing environmental claims in the courts.

The causes of action created by the environmental protection acts vary considerably. Arkansas and Georgia limit causes of action to alleged violations of a particular environmental law.[50] California, Florida, Indiana, Massachusetts, Michigan, Minnesota and Nevada grant causes of action for alleged violation of any state, local or regional statute, regulation, rule or order that exists for the protection of the air, water and other natural resources.[51] For example, Nevada enables any citizen to commence an action to "enforce compliance with any statute, regulation, or ordinance for the protection of the air, water and other natural resources from pollution, impairment or destruction . . . ."[52] The most liberal statutory causes of action, however, do not require violation of an existing environmental regulation or law as a condition precedent to filing suit. Colorado, for example, affords any person a cause of action to accomplish the purpose of the act, which is

> to establish minimum controls to prohibit the pollution of the air, water, and land, to prevent the degradation of the natural environment of recreational and mountain areas in this state in order to preserve and maintain the ecology and environment in its natural condition, to facilitate the enjoyment of the state, its ecology, nature, and scenery by the inhabitants and visitors of the state, and to protect their health, safety, and welfare.[53]

The Illinois statute is similarly broad.[54]

Finally, the various states' environmental protection acts may be

49. *See* Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572, 575 (Fla. 2d Dist. Ct. App. 1973), *rev'd*, No. 44,402 (Fla. June 12, 1974).

50. ARK. STAT. ANN. § 82-2712(d) (Supp. 1973); GA. CODE ANN. § 45-142 (Supp. 1973).

51. *See* CAL. HEALTH & SAFETY CODE § 39077.7 (West 1973); FLA. STAT. § 403.412 (1973); IND. ANN. STAT. § 13-6-1-1(a) (Burns code ed. 1973); MASS. GEN. LAWS ANN. ch. 214, § 10A (Supp. 1974-75); MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1974-75); MINN. STAT. ANN. § 116B.03 (Supp. 1974); NEV. REV. STAT. 41.540-.570 (1973).

52. NEV. REV. STAT. § 41.540 (1973).

53. COLO. REV. STAT. ANN. § 66-34-12 (Perm. Cum. Supp. 1971).

54. ILL. ANN. STAT. ch. 111½, § 1002(a)(v) (Smith-Hurd Supp. 1974).

distinguished by the type of relief granted. California, Florida and Georgia provide only injunctive relief.[55] Indiana, Michigan and Minnesota allow declaratory and equitable remedies.[56] Nevada provides for enforcement orders and other equitable relief.[57] Arkansas, Colorado and Illinois do not limit the available remedy.[58]

Although the environmental protection acts apparently broaden private citizens' standing in environmental litigation, the language of the statutes does not delineate precisely how far that standing has been extended. For example, the application of the special injury rule[59] and the exhaustion of administrative remedies doctrine[60] to statutory standing is seldom addressed by the language of the various EPA's. California's EPA, however, expressly provides that the plaintiff "shall not be required to allege facts necessary to show or tending to show lack of adequate remedy at law or to show or tending to show irreparable damage or loss."[61] This provision seems to abrogate the special injury rule and exhaustion of administrative remedies doctrine in environmental litigation. The Florida and Nevada acts require that the plaintiff give written notice of his intent to the appropriate agency 30 days before filing suit.[62] During this grace period the offending party or agency may correct the source of pollution or impair-

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55. *See* CAL. HEALTH & SAFETY CODE § 39077.7 (West 1973); FLA. STAT. § 403.412(3) (1973); GA. CODE ANN. § 45-142 (Supp. 1973).

56. *See* IND. ANN. STAT. § 13-6-1-1(a) (Burns code ed. 1973); MICH. COMP. LAWS ANN. § 691.1202 (Supp. 1974-75); MINN. STAT. ANN. § 116B.03 (Supp. 1974).

57. NEV. REV. STAT. § 41.560 (1973).

58. *See* ARK. STAT. ANN. § 82-2712(d) (Supp. 1973); COLO. REV. STAT. § 66-34-12 (Perm. Cum. Supp. 1971); ILL. ANN. STAT. ch. 111½, § 1002(a)(v) (Smith-Hurd Supp. 1974).

59. *See* notes 17-21 and accompanying text *supra*.

60. The doctrine of exhaustion of administrative remedies is an established rule of judicial administration that is used in equity and at law. It requires that "[w]here an administrative remedy is provided by statute, such remedy ordinarily must be exhausted before a litigant may resort to the courts." 73 C.J.S. *Public Administrative Bodies and Procedures* § 41 (1951). Where administrative review of a complaint is available as of right, access to the courts may be denied simply because of the complainant's failure to avail himself of that administrative right. *See* 1 FLA. JUR. *Administrative Law* § 161 (1955). One purpose of the rule is to prevent administrative bodies from transferring their duties to the judiciary. C.J.S., *supra* § 41. Some jurisdictions limit application of the doctrine to actions brought by private parties. *Id.* The rule is not absolute, however; in some situations a litigant need not pursue "to appropriate conclusion" and await "until final outcome" as a condition precedent to a judicial hearing. *Id.* Exceptions to the rule include the following: extreme cases in which compliance would be useless, *see* City of Miami Beach v. Jonathon Corp., 238 So. 2d 516 (Fla. 3d Dist. Ct. App. 1970); cases in which irreparable injury would probably result, CJS, *supra* § 41; and other special situations, *see* Renard v. Dade County, 261 So. 2d 832 (Fla. 1967) (exceptions in certain zoning cases). *See generally* 1 FLA. JUR., *supra* § 175 (Supp. 1974).

61. CAL. HEALTH & SAFETY CODE § 39077.7 (West 1973).

62. *See* FLA. STAT. § 403.412(2)(c) (1973); NEV. REV. STAT. § 41.540(1) (1973).

ment and thus avoid litigation. The filing of notice apparently is the only administrative remedy that must be exhausted in these states.[63] Other state statutes, however, do not speak clearly to the problems of special injury and exhaustion of remedies. This lack of specificity could result in dismissal of a suit for failure to plead special injury or to exhaust administrative remedies, even though standing apparently is conferred on the plaintiff by statute.

### *B. Precedent Outside Florida*

The lack of precise language in most environmental protection acts allows or, perhaps, invites judicial interpretation. Thus the liberal or strict interpretation of these statutes by the judiciary ultimately will establish the effectiveness of the EPA's for use by environmentally concerned citizens. Not until 1973 and early 1974, however, did several state appellate courts begin to interpret and apply their acts. The treatment of EPA's in other jurisdictions may be indicative of the general reception such legislation will be accorded by the judiciary. Moreover, the Florida courts—because of the dearth of EPA case law in Florida—may look to other jurisdictions when called upon to interpret Florida's EPA. Therefore, it may be helpful to examine judicial acceptance and construction of EPA's generally, in order to ascertain the Florida Act's potential scope.

In *County of Freeborn v. Bryson*[64] the Minnesota Supreme Court ruled that the Minnesota Environmental Rights Act[65] restricts local government discretion to locate public improvements.[66] The court

63. Nevada and Florida EPA statutes expressly provide that administrative agencies have 30 days in which to correct the alleged violation. FLA. STAT. § 403.412(2)(c) (1971); NEV. REV. STAT. § 41.540(1) (1973). By implication it seems that in these two states the plaintiff need not allege exhaustion of administrative remedies; rather it seems that he need plead only that the agency has been given 30 days to correct the violation, and has failed to do so. Since the acts expressly require the filing of a verified complaint and a 30-day waiting period, it would seem that had the legislature intended additional administrative action then it would have stated that intent. Filing of the complaint is intended to draw the agency's attention to the alleged violation of an environmental law. The purpose of the 30-day waiting period is to allow the agency to avoid litigation by taking immediate steps to correct the alleged EPA violation. Prompt agency action avoids lengthy litigation delays during which irreparable environmental injury could occur.

The remaining EPA's do not address administrative action, and therefore these statutes impliedly may require that the plaintiff allege exhaustion of remedies. *See, e.g.*, City of Boston v. Massachusetts Port Authority, 308 N.E.2d 488, 504 (Mass. 1974). However, if irreparable injury probably would result, then an exception to the doctrine may exist. *See* note 60 *supra*; *cf.* K. DAVIS, ADMINISTRATIVE LAW TEXT § 21.01 (1972).

64. 210 N.W.2d 290 (Minn. 1973).

65. MINN. STAT. ANN. §§ 116B.01-.13 (Supp. 1974).

66. 210 N.W.2d at 295. In the *County of Freeborn* case a county sought to condemn part of a farmer's land for a road. The landowner complained that the proposed con-

interpreted "person" to include conservation groups and granted the Sierra Club standing.[67] The Act was found to require that decisions affecting the environment be made by balancing "ecological against technical considerations."[68] Thus, while a cause of action requires a prima facie showing of "(1) protectable natural resource, and (2) pollution, impairment or destruction of that resource," the prima facie case "may be rebutted by showing that there is 'no feasible or prudent alternative' or that the conduct is in the best interest of the public."[69] It should be noted, however, that the court indicated that it was compelled by legislative intent to interpret the statute broadly.[70] Nevertheless, the same court six months later upheld the dismissal of another case[71] filed pursuant to the same act, and recognized that enforcement of the Minnesota EPA is limited by the statutory procedural safeguards of prior notice and an adequate hearing.[72]

The Supreme Judicial Court of Massachusetts liberally construed that state's environmental protection act, holding that it provides a

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demnation would destroy a natural wildlife marsh. Expert witnesses testified that the highway would in fact have detrimental effects on the marsh. Before the county could present its defenses, the trial court dismissed the action for failure to state a prima facie case. The supreme court reversed, holding that the county should have an opportunity to present its affirmative defenses, since a valid cause of action was pleaded under the Minnesota Environmental Rights Act. If such defenses were unsuccessful, the county would be prevented from taking the property. *Id.* at 292-97.

67. *Id.* at 295.

68. *Id.* at 297.

69. *Id.* at 297-98. The balancing test used by the court in *County of Freeborn* is the result of the court's interpretation of portions of the Minnesota Environmental Rights Act, MINN. STAT. ANN. § 116B.04 (Supp. 1974). The Minnesota Act is more exhaustive than the Florida EPA in that the former specifically addresses the questions of the burden of proof and affirmative defenses. The Florida EPA does not expressly formulate a similar balancing test. Nonetheless, the Minnesota court's characterization of the judicial function in the EPA litigation seems to be a good one: The court balances evidence of environmental damage to a protectable resource against rebutting evidence that there is no reasonable alternative means to conduct the activity and that such activity both is consistent with the public welfare and is required to promote that welfare. *See* 210 N.W.2d at 297-98. Such an approach places the burden of proof on the "polluter" once a prima facie case of environmental damage is made. Moreover, the balancing test encourages informed and sagacious decisions by providing that the court weigh the practical import of promoting public welfare through development against the possibly overriding concern of protecting the environment. The Florida EPA does not expressly formulate a similar judicial role; it leaves that task to the courts. Nevertheless, the utility of the judicial role assumed in the *County of Freeborn* EPA litigation seems apparent.

70. *See id.* at 296.

71. State *ex rel.* Ludwig v. City of Bemidji, 212 N.W.2d 876 (Minn. 1973).

72. *Id.* at 878. The opinion reasoned that the statutory safeguards mandate that before a city's permit to pollute could be revoked, the city must be given adequate notice that it is in violation of newly drafted pollution standards. Furthermore, the city must be informed of the consequence of its violation and be given an opportunity to be heard. *Id.* at 880; *see* note 83 *infra.*

cause of action to enforce procedural as well as substantive violations of air pollution control regulations.[73] The opinion offers a provocative explanation of the important distinction between standing and jurisdiction under the Massachusetts act.[74] The case involved a suit by the city of Boston to enjoin construction of a new passenger terminal by the Massachusetts Port Authority. The Authority argued that the city lacked statutory standing to sue because the Authority's alleged procedural violation did not constitute environmental damage "about to occur."[75] The supreme court explained that this argument did not go to the city's standing; rather, it raised the issue of the court's jurisdiction under the terms of the act.[76] Statutory standing was expressly granted by the act "upon the petition of any political subdivision";[77] therefore the city had standing. The court reasoned that the real issue raised by the city's complaint was the "question of whether the plaintiff's allegations are sufficient to invoke the jurisdiction of the Superior Court under the terms of [the act],"[78] and that jurisdiction can be invoked only if the complaint alleges that "damage to the environment is occurring or is about to occur."[79] The opinion concluded that an alleged procedural violation of an environmental regulation provides such jurisdiction because the department's regulatory scheme is comprehensive: compliance with each element of the regulations is essential to the effective prevention of air pollution.[80] Hence, "[i]f one of the principal purposes (i.e., the prevention of air pollution) of [the act] is to be realized, then a petition under that section must lie to enforce the entire air pollution regulatory scheme."[81] In short, procedural as well as substantive violations were found sufficient to invoke jurisdiction of the court and afford plaintiff a remedy. This expansive interpretation[82] of the Massachusetts environmental protection act has very practical consequences. Enforcement of procedural requirements can indirectly deter pollution or impairment of natural re-

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73. City of Boston v. Massachusetts Port Authority, 308 N.E.2d 488, 494-95 (Mass. 1974).

74. *See id.* at 493-94. The procedural violation committed by the authority was its failure to submit the terminal plans to the Department of Public Health for approval. *Id.* at 491-92.

75. *Id.* at 493.

76. *See id.*

77. MASS. GEN. LAWS ANN. ch. 214, § 10A (Supp. 1974-75).

78. 308 N.E.2d at 493.

79. MASS. GEN. LAWS ANN. ch. 214, § 10A (Supp. 1974-75).

80. 308 N.E.2d at 494-95.

81. *Id.* at 494.

82. *But see id.* at 504, where the court applies the exhaustion of administrative remedies doctrine to EPA actions.

sources because, if procedural violations are enjoined, substantive violations are not likely to occur.

EPA suits also have been reported from Illinois,[83] Michigan[84] and

83. The Illinois courts have decided a number of cases under the Illinois Environmental Protection Act of 1970, ILL. ANN. STAT. ch. 111½, §§ 1001-51 (Supp. 1974), most of which are not relevant to the focus of this note. Relevant Illinois cases, however, suggest a somewhat restrictive application of the Act in certain areas. For example, the supreme court has held that under the "exhaustion of remedies" doctrine, *see* note 60 *supra*, in order for an aggrieved party to appeal an Illinois Pollution Control Board order, that party must have participated in the Board's hearing. *See* Lake County Contractors Assoc. v. Pollution Control Bd., 294 N.E.2d 259, 262 (Ill. 1973); *cf.* W.F. Hall Printing Co. v. Environmental Prot. Agency, 306 N.E.2d 595, 597 (Ill. App. Ct. 1974). Moreover, several Illinois appeals court cases, involving the sufficiency of evidence, seem to place a somewhat heavy burden of proof on the advocate of environmental protection. It must be noted, however, that the advocate involved in each of these cases was an administrative agency, the Pollution Control Board. In one case, the court rejected the proposition that the Board need only show a potential violation of its pollution tables to shift the burden to the alleged offending party:

> Requiring the appellant to assume such a burden is . . . not supported by the regulations, is ambiguous in light of the regulation itself and is of doubtful propriety in view of the nature of the sanctions which the Board is authorized to impose.

George E. Hoffman & Sons, Inc. v. Pollution Control Bd., 306 N.E.2d 330, 334 (Ill. App. Ct. 1974). Another court, in reviewing the evidence presented in a Board hearing, vacated the Board's order because the evidence failed to support the "fact" of a violation; the Board was required to prove more than an "ability" of the offending party to violate its standards. Central Ill. Light Co. v. Illinois Pollution Control Bd., 308 N.E.2d 153, 155 (Ill. App. Ct. 1974). Thus these two opinions appear to require the Pollution Control Board to justify its tabular figures and to prove actual, rather than possible, violations of the Board's pollution standards before it can obtain a judicial remedy. However, another district court of appeals upheld Board orders when it found "substantial evidence in the record" to support them. *See* Incinerator, Inc. v. Illinois Pollution Control Bd., 305 N.E.2d 35, 41 (Ill. App. Ct. 1973); Cobin v. Pollution Control Bd., 307 N.E.2d 191, 199 (Ill. App. Ct. 1974).

Despite a rather restrictive reading of some areas of the Act, when faced with constitutional issues the Illinois courts seem to have charted a liberal course. For example, an appeals court upheld a Pollution Control Board cease and desist order, and rejected the argument that the order was an unconstitutional taking of property. *See* Cobin v. Pollution Control Bd., 307 N.E.2d 191, 199 (Ill. App. Ct. 1974). The court rejected the argument that the order was an unconstitutional taking of property without compensation, and reasoned that the Board was only exercising its reasonable police power. Moreover, the court felt that denying the Board such an effective enforcement device not only would deprive it of a useful remedy but also would "make violation of laws and regulations . . . a profitable enterprise." *Id.* An Illinois court also considered the impact of the due process requirement of proper notice on the enforcement of environmental laws. *See* George E. Hoffman & Sons, Inc. v. Pollution Control Bd., 306 N.E.2d 330 (Ill. App. Ct. 1974). The Illinois court reached a result contrary to that of a Minnesota case involving a similar question. *See* note 72 and accompanying text *supra*. The court chose not to tie the hands of the Pollution Control Board with strict statutory notice requirements. 306 N.E.2d at 331. Another Illinois case held that, in the absence of odor standards, the Board can decide on a case-by-case basis whether odor pollution has in fact occurred. In other words, the offending party was not denied due process simply because the Board had no published criteria on which to base odor pollution decisions.

federal district courts.[85] The judicial treatment of EPA actions in those jurisdictions generally has been favorable. None of the reported cases, however, involves the precise issue that is the present subject of inquiry. In fact, most of the case law involves suits brought by governmental bodies rather than by private citizens. Nonetheless, the reported cases do reflect a liberal reading of EPA's by the judiciary. Furthermore, the balancing test formulated by the Minnesota Supreme Court,[86] and the jurisdiction-standing distinction applied by the Massachusetts high court,[87] are valuable precedents for construing and applying environmental protection acts.

## III. FLORIDA'S ENVIRONMENTAL PROTECTION ACT OF 1971

### *A. Legislative History and Legislative Intent*

The expansive language of Florida's Environmental Protection Act suggests that the legislature intended to provide for broad citizens' participation in environmental management:

> (2)(a) The department of legal affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:
> 1. Any governmental agency or authority charged by law with the

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*See* W.F. Hall Printing Co. v. Environmental Prot. Agency, 306 N.E.2d 595, 598-99 (Ill. App. Ct. 1974). *See generally* Fitzpatrick, *Private Legal Remedies to Air Pollution in Illinois*, 59 ILL. B.J. 746 (1971); Note, *Environmental Protection in Illinois: A Comparison of State Laws*, 1973 URB. L. ANNUAL 353.

84. Michigan's EPA, *see* note 47 *supra*, was the first legislation of its kind enacted. Nevertheless, there seem to be surprisingly few reported EPA cases in that state. An article studying the progress of the Michigan EPA found positive reaction to the EPA in Michigan trial courts. *See* Sax & Connor, *supra* note 21, at 1006-09. This favorable reception of the EPA has resulted in negotiated settlements in several cases, which may account for the dearth of case law. *Id.* at 1010-14. Sax and Connor go on to state that the courts have exhibited a readiness to examine the merits of a case as soon as possible, and have shown an understanding of the issues in most instances. *Id.* at 1032-33. Moreover, Michigan's EPA seems to have had an impact on both administrative agencies and the private sector. For example, *Michigan Farmer* cautioned its readers to adopt pollution guidelines voluntarily. *Id.* at 1053, *citing* MICHIGAN FARMER, March 4, 1972.

85. In Illinois *ex rel.* Scott v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973), the state of Illinois attempted to enforce its environmental protection act against the City of Milwaukee, which was dumping raw sewage into Lake Michigan. The city asserted that the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1151(b)-(c) (Supp. II 1972), preempted all state remedies; thus Illinois could not enjoin the pollution through its state environmental law. The federal court held that the federal remedies are only supplemental to "any pre-existing state remedies," and stated that if Congress had intended to preempt state remedies, such an intent would have been expressly stated in the Act. 366 F.2d at 300-01.

86. *See* notes 68-69 and accompanying text *supra*.

87. *See* notes 75-79 and accompanying text *supra*.

> duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;
> 2. Any person, natural or corporate, governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules or regulations for the protection of the air, water, and other natural resources of the state.[88]

Moreover, although the legislative history of Florida's EPA is somewhat sparse, there is nothing in that history to imply that the Act is to be strictly construed. The tortuous route that the Act followed through the legislature[89] might explain the fact that apparently only one document exists even remotely bearing on legislative intent. That document is an "abstract" in the Environmental Pollution Control

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88. FLA. STAT. § 403.412(2)(a) (1973).

89. On April 6, 1971, House Bill 386 (H.R. 386), entitled "An act relating to air and water pollution," was introduced by Representatives Richard Hodes and David Clark. FLA. H.R. JOUR. 30 (1971). That bill provided that "the attorney general, any person, or any political subdivision of the state may maintain an action for declaratory and equitable relief against the state, any political subdivision thereof or any person or legal entity for the protection of the natural resources of the state . . . ." *Id.* The same day a similarly titled bill, H.R. 430, was introduced by Representative Guy Spicola. *Id.* at 34. It appears to have been based on the Michigan "Thomas J. Anderson, Gordon Rockwell environmental protection act of 1970," which was drafted by Professor Sax. *See* MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1973-74); Sax & Connor, *supra* note 21, at 1006 n.9. H.R. 430 also related to "protection of the air, water, and other natural resources of the state." FLA. H.R. JOUR. 34 (1971). Both bills were referred to the Committee on Environmental Pollution Control, which was chaired by Representative Spicola. This committee recommended a committee substitute for H.R. 386 and H.R. 430. *Id.* at 79.

On April 14, 1971, the committee substitute was amended and passed by a vote of 107 to 5. *Id.* at 158. In April 1971 Senators Robert Graham and Gerald Lewis introduced S. 327, entitled "Pollution Control; Relief procedures." FLA. S. JOUR. 25, 131, 153, 401 (1971). On May 31, 1971, S. 327 was laid aside and the House's committee substitute was referred to the Judiciary Civil B Committee, and then amended and certified to the House. *Id.* at 606-07. In fact, the Senate's amendments were a complete rewrite of both the bill and title of the committee substitute. *See* FLA. H.R. JOUR. 944-45 (1971). The Senate amendments were approved by the House by a 94 to 3 vote. *Id.* at 945. On June 14, 1971, the bill was presented to the Governor and signed into law as Fla. Laws 1971, ch. 71-343 (codified at FLA. STAT. § 403.412 (1973)).

The Judiciary Civil B Committee, chaired by Senator Mallory Horne, actually drafted the EPA. Unfortunately, however, the file on this committee contains no discussion of legislative intent. The only intent that has been recorded appears in the title of the act. *See* file on 1971 Judiciary Civil B Committee (House of Rep. Library, Holland Building, Tallahassee, Florida). The file of Representative Spicola's Committee on Environmental Pollution Control of 1971 is similarly barren of the EPA's legislative history, *see* file on 1971 Committee on Environmental Pollution Control (House of Rep. Library, Holland Building, Tallahassee, Florida) [hereinafter cited as Committee File], except for one abstract. *See* notes 90-91 and accompanying text *infra.*

Committee file which discusses the "semantical breakdown of efforts in the environmental field [which] range from 'pollution control' to 'preservation' . . . ."[90] This abstract, as part of a ten-state comparison, concluded:

> On environmental grounds, the traditional policy of local control of land use management through zoning has contributed to urban sprawl, destruction of open space, shorelines, and wetlands, building in floodplains, concentrating industrial and other waste sources in vulnerable parts of the environment or near human living centers increasing exposure to pollution, noise, nuisance and other environmental hazards. It has been argued that local authorities are too susceptible to political and economic pressure and cannot look beyond their jurisdictional boundaries.[91]

This language seems to reflect a recognized need for increased numbers of private attorneys general to police the environment; it therefore seems logical that the EPA's statutory grant of standing should be construed liberally to fulfill that need.

Nor does the context of the EPA suggest that a strict construction was intended. The EPA is one part of a comprehensive legislative scheme—Florida statutes chapter 403, the Florida Air and Water Pollution Control Act—which provides a wide variety of statutory vehicles designed to forestall environmental degradation. This chapter creates the Department of Pollution Control (DPC),[92] which has broad powers and duties to control and prohibit pollution.[93] Moreover, chapter 403 includes several acts, in addition to the EPA, which evince a legislative concern for the environment: Florida Water Pollution Control and Sewage Treatment Plant Grant Act of 1970;[94] Florida Litter Law of 1971;[95] State Bond Program and Sewage Treatment Revolving Loan Program;[96] Florida Electrical Power Plant Siting Act.[97]

Finally, the broad reach of the EPA itself, as reflected in the title of the Act, seems to indicate a legislative intention to encourage judicial intervention in environmental management:

> An act relating to protection of the air, water, and other natural resources of the state; providing for actions for injunctive relief for

90. *Abstract: Philosophical Approach* 3, in Committee File.
91. *Id.* at 22.
92. FLA. STAT. § 403.045 (1973).
93. FLA. STAT. § 403.061 (1973).
94. FLA. STAT. §§ 403.1821-33 (1973).
95. FLA. STAT. § 403.413 (1973).
96. FLA. STAT. § 403.1835 (1973).
97. FLA. STAT. §§ 403.501-15 (1973).

> protection of said resources; prescribing the duties of the department of legal affairs, political subdivisions, municipalities and citizens of the state; providing for judicial proceedings relative to the purposes of this act; authorizing intervention in all types of proceedings involving any injury to natural resources; providing for assessing attorney's fees, court costs or requiring bond; recognizing the doctrines of res judicata and collateral estoppel; providing an effective date.[98]

In short, it is difficult to find anywhere an indication that the grant of standing provided by the Florida EPA should not be interpreted as liberally as the broad language of the Act itself seems to suggest.

### *B. Applying the Statute: Interpretation and Construction*

The EPA expressly confers on citizens of Florida[99] a cause of action (1) to *compel* a governmental agency to comply with its duty to enforce regulations designed to protect the natural resources of the state[100] and (2) to *enjoin* any person, governmental agency or authority from violating such laws, rules or regulations.[101]

There are several conditions precedent, however, to institution of judicial proceedings.[102] First, the complaining party must file a verified complaint with the governmental agency or authority charged by law with regulating or prohibiting offending conduct.[103] This complaint must allege the "manner" in which the complaining party is "affected."[104] Secondly, the governmental agency or authority is given 30 days to take "appropriate" action to correct the offending conduct.[105] The agency's failure to take such "appropriate" action enables the complaining party to initiate judicial proceedings.[106] Finally, the plaintiff may be required to post a "good and sufficient" surety bond, or cash, if the court has reasonable grounds to doubt the plaintiff's ability to pay the costs of litigation and any judgment against him should the other party prevail.[107]

The EPA also includes several explicit limitations. First, the only remedy available is injunctive relief;[108] no damages can be awarded.

98. Fla. Laws 1971, ch. 71-343.
99. FLA. STAT. § 403.412(2)(a) (1973).
100. FLA. STAT. § 403.412(2)(a)(1) (1973).
101. FLA. STAT. § 403.412(2)(a)(2) (1973).
102. *See* FLA. STAT. § 403.412(2)(c) (1973).
103. FLA. STAT. § 403.412(2)(c) (1973).
104. FLA. STAT. § 403.412(2)(c) (1973).
105. FLA. STAT. § 403.412(2)(c) (1973).
106. *See* FLA. STAT. § 403.412(2)(c) (1973).
107. *See* FLA. STAT. § 403.412(2)(f) (1973).
108. FLA. STAT. § 403.412(3) (1973).

The prevailing party, however, is entitled to costs and attorneys' fees.[109] Thus, the court's discretion to assess costs among the parties is expressly limited by the statute. This limitation on the court's discretion may discourage potential plaintiffs who doubt the merits of their cases, since the offending party's costs and attorneys' fees will likely be considerable. Secondly, compliance with a currently valid permit by the offending party is a defense to any EPA action.[110] Thus, a citizen cannot sue those who are impairing, polluting or destroying natural resources with an agency's approval.[111] The plaintiff therefore must sue the governmental source that granted the permit. If that source is federal, the EPA's utility is questionable. Finally, the doctrines of res judicata and collateral estoppel apply.[112] This limitation may cause problems when the offending party believes that a second EPA suit raises issues previously litigated, and the complaining party insists that the subsequent allegations are distinct.

Both the title of the EPA[113] and its limited legislative history[114] suggest that the Act should be liberally construed. Moreover, judicial treatment of similar legislation in other jurisdictions reflects a trend toward expansive construction of EPA's by the courts.[115] Finally, and presumably most importantly, the constitution of the State of Florida seems to mandate[116] that the courts interpret the EPA in a manner that will comport with the state's policy to "conserve and protect its natural resources." It seems apparent that conserving and protecting natural resources requires a liberal interpretation of an act entitled the Environmental Protection Act. Nevertheless, the language of the statute is not precise. Judicial construction is necessary, and there is room for a narrow interpretation that could severely limit the impact of the Act.

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109. FLA. STAT. § 403.412(2)(f) (1973).

110. FLA. STAT. § 403.412(2)(e) (1973).

111. An EPA plaintiff may challange the validity of a permit authorizing environmental pollution, impairment or destruction because such a permit is contrary to the state's constitutional policy, FLA. CONST. art. II, § 7, and to declared legislative intent. *See, e.g.*, FLA. STAT. § 403.021 (1973). Seadade Indus. Inc. v. Florida Power & Light Co., 245 So. 2d 209 (Fla. 1971), is the only reported case to date that interprets art. II, § 7. In that case the court found that the constitutional policy imposed environmental consideration as a limit on the exercise of the power of eminent domain. *Id.* It seems to follow that such a policy also imposes a limit on the power of agencies to grant permits. Therefore, a permit that authorizes environmental impairment may be invalid and, in that case, such permit would not constitute a defense against an EPA suit. *See* FLA. STAT. § 403.412(2)(e) (1973).

112. FLA. STAT. § 403.412(4) (1973).

113. *See* note 98 and accompanying text *supra*.

114. *See* notes 88-91 and accompanying text *supra*.

115. *See* notes 64-87 and accompanying text *supra*.

116. FLA. CONST. art. II, § 7.

### (1) The Meaning of "Citizen"

#### *(a) "Affected" Citizens*

Perhaps the most critical provision that the courts must interpret concerns the EPA's grant of standing to private citizens.[117] Judicial construction of this grant will determine the EPA's effectiveness in opening the courts to environmentally concerned plaintiffs. The prerequisite that the complaining party allege the "manner" in which he is "affected"[118] possibly could be construed to require that a citizen must plead a "special injury."[119] This interpretation of the Act, however, seems incorrect for several reasons. First, if the legislature had intended to retain the "special injury" doctrine, then there was no purpose in providing citizens with standing pursuant to the EPA: citizens already enjoyed "special injury" standing under the common law.[120] Secondly, application of the special injury rule in effect closes the courthouse doors to environmentally concerned citizens. This result would fly in the face of the apparent legislative and constitutional intent to preserve and protect the natural resources of the state;[121] opening the courts to concerned citizens would help to ensure that laws passed for protection of the environment are enforced.[122]

Additionally, a restrictive interpretation of the standing provision would distort the language and organization of the statute. Subsection 2(a) of the statute authorizes standing for citizens. Nowhere in that subsection does the language refer to "special injury." Moreover, the Department of Legal Affairs, political subdivisions and municipalities are granted standing in the same clause. As governmental bodies, these entities were never restricted by the special injury rule from initiating environmental suits at common law.[123] Thus a special injury requirement for private citizens' standing seems inconsistent with the remainder of the subsection. If a complaint alleges that the plaintiff is a citizen, standing should be established and the court should proceed to the merits of the case.[124]

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117. *See* notes 59-63 and accompanying text *supra.*

118. FLA. STAT. § 403.412(2)(c) (1973).

119. *See* notes 17-21 and accompanying text *supra.*

120. *See* notes 17-18 and accompanying text *supra.*

121. *See* notes 88-98 & 116 and accompanying text *supra.*

122. "Though legislation is a necessary first premise, it will be of no avail if not effectively enforced." Jaffe, *Ecological Goals and the Ways and Means of Achieving Them,* 75 W. VA. L. REV. 1, 18 (1972).

123. *See* note 16 and accompanying text *supra.*

124. *See* City of Boston v. Massachusetts Port Authority, 308 N.E.2d 488, 493-94 (Mass. 1974); notes 75-79 and accompanying text *supra.*

Further, reading the "special injury rule" into the statutory requirement that the verified complaint state the "manner in which the complaining party is affected," FLA.

### *(b) Corporations as Citizens*

The statutory grant of standing to citizens presents yet another important issue—whether environmentally concerned corporations are "citizens" under the Act. The practical consideration of the costs of litigation makes resolution of this issue critical.[125] The arguments favoring an interpretation of the EPA that would abolish the "special injury rule"[126] also are relevant to this inquiry. An act intended to open the courthouse doors to citizens is of somewhat dubious value if the "cover charge"—the cost of modern litigation—keeps most citizens out.

The Florida Supreme Court has held that a labor organization has standing to sue on behalf of its members since, "if the union were not given standing to sue on [the employees'] behalf, it is questionable whether the employees would be afforded an 'efficient and expeditious adjudication of their rights.' "[127] The same principle should apply to EPA litigation. The Florida constitution provides "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[128] It is doubtful that environmentally concerned citizens can be "afforded an 'efficient and expeditious adjudication of their rights' " if "citizens" under the EPA is construed to exclude an environmental organization from suing on behalf of its members.[129]

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STAT. § 403.412(2)(c) (1973), ignores the clear purpose of subsection (2)(c). Subsection 2(a) of the EPA grants standing and imposes no condition. The legislature obviously was aware of the expansiveness of this statutory grant of standing, and, in order to avoid unnecessary litigation, subsection 2(c) was added. If an agency charged with enforcing environmental laws is willing to enforce such laws, judicial intervention is unnecessary and senseless. The purpose of requiring a party to file a verified complaint with the relevant agency is to afford such agency an opportunity to act and moot the proposed litigation.

125. *See, e.g.*, Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572, 575 (Fla. 2d Dist. Ct. App. 1973), *rev'd*, No. 44,402 (Fla. June 12, 1974); *see* note 49 and accompanying text *supra*.

126. *See* notes 17-21 and accompanying text *supra*.

127. Cannery Employees Local 444 v. Winter Haven Hospital, 279 So. 2d 23, 27 (Fla. 1973), *citing* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

128. FLA. CONST. art. I, § 21.

129. *See* NAACP v. Button, 371 U.S. 415, 428-31 (1963), which held that the plaintiff corporation had standing to assert the rights of its members. The Court felt that litigation may be the only practical avenue for the redress of the members' grievances. *Id.* at 430. Furthermore, the Court recognized that in some cases the most effective means for redressing grievances is to associate for the purpose of litigation. *See also* United States v. SCRAP, 412 U.S. 669, 686-87 (1973); Sierra Club, Inc. v. Morton, 405 U.S. 727, 735 (1972). *SCRAP* and *Sierra Club* both held that an association has standing to litigate the environmental injuries of its members if the members are injured in fact. "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." 405 U.S. at 739.

### (2) The Role of the Courts

Whatever limitations the courts ultimately place on the EPA's statutory grant of standing to citizens, it seems apparent that the Act will make the courts more accessible to the environmentally concerned plaintiff. But this might not be the most significant effect of the EPA. Prior to enactment of the new law, administrative agencies were vested with the duty to enforce environmental legislation.[130] Their discretion was extremely broad, and courts were reluctant to interfere with agency decisions.[131] The EPA marks the demise of the almost carte blanche authority of administrative agencies concerned with environmental regulation. Pursuant to the EPA, such an agency now can be compelled to account for its decisions and actions in court. Furthermore, if those actions are found to be in derogation of the agency's duty, the court may require the agency to enforce the law.[132] Thus the EPA provides for checks and balances on bureaucratic decisions affecting the environment. Administrative agencies aware that they may be called into court to justify their actions and inaction probably will become more diligent, if only to avoid litigation and the possible embarrassment of being overruled by the courts. Increased vigilance on the part of administrative agencies resulting from the mere existence of the EPA could well have a greater impact on the improved management of the environment than will litigation authorized by the Act.[133]

### (3) Scope of Protection

The mere existence of statutory standing raises two additional, complex issues. First, with which regulatory agency or authority does the duty of enforcing particular laws for the protection of the environment rest?[134] Secondly, which laws, rules and regulations are intended to protect the air, water and other natural resources?[135] Eventually, definitive decisions will have to be reached charging particular agencies with responsibility for the enforcement of environmental laws.[136] This allocation of responsibility will have a beneficial effect on environmental management: concerned citizens will be made

130. Sax & Connor, *supra* note 21, at 1005.

131. *Id.*

132. FLA. STAT. § 403.412(3) (1973).

133. *See* Sax & Connor, *supra* note 21, at 1050-54.

134. *See* FLA. STAT. § 403.412(2)(a)(1) (1973). *See also* Sax & Connor, *supra* note 21, at 1018.

135. *See* FLA. STAT. § 403.412(2)(a)(2) (1973).

136. *See, e.g.*, Calvert Cliffs Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); New Hampshire v. AEC, 406 F.2d 170 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969).

aware of the agencies responsible for protection of the environment. This in turn will facilitate public scrutiny of the actions of those agencies.

The second question raised by EPA standing also must be answered by the courts. The judicial construction of "laws, rules or regulations for the protection of the air, water, and other natural resources"[137] will determine the courts' jurisdiction under the EPA. If a party brings an EPA action that the court determines does not seek to compel an agency to enforce "laws, rules or regulations for the protection of the air, water, and other natural resources," or to enjoin a party from violating such laws, the court will be without jurisdiction under the Act and will be required to dismiss the case.

On the other hand, the EPA might be liberally construed to implement fully article II, section 7, of the Florida constitution, which provides:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

Because of the all-encompassing implication of the language "laws, rules or regulations" the EPA might be interpreted in a broad sense to provide a cause of action even when state *policy* is contravened. While such an expansive interpretation of the Act might seem unwarranted, it is not entirely implausible when factors other than the precise statutory language are considered. Unlike other environmental legislation the EPA neither proscribes specific conduct nor requires specific affirmative state action, such as the expenditure of funds. Instead the Act is designed to provide judicial oversight of environmental management, an objective that similarly could be realized by providing a cause of action whenever constitutional policy is violated. Furthermore, the constitutional provision looks forward and calls for provisions to implement it.[138] The EPA looks back to existing laws designed to protect the environment and becomes operative if such laws are violated. The enforcement of those laws obviously is intended to further constitutional policy, an intent that could be facilitated by

137. FLA. STAT. § 403.412(2)(a); *see* note 88 and accompanying text *supra*.

138. It must be remembered, however, that article II, § 7, is not self-executing. Rather, it only commands the legislature to enact legislation to further the state constitutional policy. Therefore, article II, § 7, standing alone does not provide a cause of action. *See generally* 6 FLA. JUR. *Constitutional Law* § 32 (1956). A cause of action may arise when constitutional policy is violated only if the EPA is interpreted to implement article II, § 7.

enforcement of that policy itself through the use of EPA statutory standing.

The language of the statute does, however, imply some limitation on the courts' jurisdiction. For example, do laws that preserve and conserve natural resources "protect" them? In delineating the scope of "protection" it seems logical to consider the use of the terms "pollution," "impairment" and "destruction" in other sections of the Act.[139] Read in the context of this terminology, "protection" implies that any law intended to benefit natural resources or prevent injury to them is within the scope of the Act.

Furthermore, what do "natural resources" include besides air and water? In *Morrill v. Edward Ball Wildlife Foundation*[140] the trial judge held that wildlife and fish are not natural resources. Furthermore, the judge found that "impairment of navigation, as such, is not within the scope of pollution, impairment or destruction of air, water and other natural resources."[141] A restrictive interpretation of the term "natural resource" would seem to run against the very title of the Environmental Protection Act. Any natural resource that constitutes part of the environment of the state should come within the auspices of the Act.

### (4) Procedural Obstacles

Another limitation will result if a narrow definition of "state" is read into the phrase "for the protection of the air, water, and other natural resources of the state."[142] A restrictive reading of "state" could limit EPA protection to "sovereign" natural resources, that is, resources actually owned by the state. Such a construction does not seem logical for several reasons. The EPA provides a cause of action against any "governmental agency."[143] If "state" means "sovereign," then only "state agencies" could be sued because non-sovereign agencies do not enforce laws or regulate sovereign lands. The title of the EPA includes the clauses "resources of the state" and "resources"; this could add strength to the argument that "of the state" is merely a qualifying phrase to limit EPA actions to those involving resources within

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139. FLA. STAT. §§ 403.412(2)(e)-(5) (1973).

140. No. 401 (Fla. 2d Cir. Ct. July 2, 1973), *aff'd*, No. U-29 (Fla. 1st Dist. Ct. App. May 12, 1974). *See* THE FLORIDA BAR, ENVIRONMENTAL REGULATION AND LITIGATION IN FLORIDA app. G, § IV, at 602 (Continuing Legal Educ. Series 1973), summarizing the holding in *Ball*.

141. No. 401.

142. FLA. STAT. § 403.412(2)(a)(2) (1973).

143. FLA. STAT. § 403.412(2)(a)(1) (1973).

Florida's boundaries.[144] The statutory language, "citizen *of the state*,"[145] reflects a similar intent to use "of the state" as a qualifying phrase. Moreover, if the EPA is considered in context with the rest of chapter 403, it is clear that its scope is not limited to sovereign resources. For example, the Department of Pollution Control (DPC) has jurisdiction over non-sovereign resources; the "waters" under DPC auspices "shall include, but not be limited to rivers, lakes, streams, springs, impoundments, and all other waters or bodies of water . . . . Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water . . . ."[146] In another chapter concerning environmental legislation[147] "waters in the state" is defined as "any and all water on or beneath the surface of the ground or in the atmosphere . . . as well as all coastal waters within the jurisdiction of the state."[148]

Thus, it seems reasonable to conclude that "of the state" means within the state. Moreover, no court yet has limited the EPA to actions involving sovereign resources, and, in fact, about half of the EPA cases filed have involved non-sovereign natural resources.[149]

Subsection 2(c) of the Act presents still another possible limitation on an EPA cause of action. That section provides that the offending party be given 30 days "to take appropriate action."[150] The standard for "appropriate action," however, is not specified in the Act. A violating agency could delay the final resolution of an EPA action by alleging that appropriate action had been taken. Furthermore, the merit of such a dilatory tactic apparently would have to be resolved on a case-by-case basis.[151] In one of the few cases decided under the EPA, *Save Our Bay*,[152] the effect of "appropriate action" was discussed:

> It is exceedingly difficult for us to reasonably perceive . . . that appellant, comprising a group of lay citizens interested in protecting

144. *See* note 98 and accompanying text *supra*.

145. FLA. STAT. § 403.412(2)(a) (1973) (emphasis added).

146. FLA. STAT. § 403.031(3) (1973); *see* FLA. STAT. § 403.062 (1973); Memorandum of Department of Pollution Control, January 21, 1974. *See also* FLA. CONST. art. 2, § 7, which makes explicit the policy of the state to "protect its natural resources and scenic beauty."

147. FLA. STAT. ch. 373 (1973).

148. FLA. STAT. § 373.019(9) (1973).

149. *See* THE FLORIDA BAR, ENVIRONMENTAL REGULATION AND LITIGATION IN FLORIDA § 601.04 (Continuing Legal Educ. Series 1973).

150. FLA.. STAT. § 403.412(2)(c) (1973).

151. No settled standards exist as to what is "appropriate action" by an agency for the myriad of possible violations of environmental laws. Furthermore, the court apparently will presume that public officials are acting correctly. *See* Yonge v. Askew, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

152. Save Our Bay, Inc. v. Hillsborough County Pollution Control Comm'n, 285 So. 2d 447 (Fla. 2d Dist. Ct. App. 1973).

> and upgrading the environment, would have any further knowledge of the action or nonaction of the appellees in the premises other than that alleged in its complaint. To require appellant to plead its case with more particularity and specificity would be inconsistent with the well accepted and understood concept of liberality in pleading.[153]

Thus, at least in the Second District, if any "appropriate" action is taken by the offending party, such action must be communicated and explained to the complaining party, in order to allow the latter to amend its complaint or withdraw the suit. An EPA complaint has been amended in at least one circuit court case.[154] The 30-day waiting period, which is required for the initial institution of EPA actions, was not required to precede filing of the amended complaint.[155] Another hurdle plaintiffs must clear lies in subsection (2)(f) of the Act. This portion of the Act authorizes the court to require a bond if it appears that the plaintiff will be unable to pay any cost or judgment.[156] Only one case so far has required such a bond, in the amount of 3500 dollars.[157] The statutory section allowing the bond unfortunately could condition justice on the complaining party's solvency. Therefore, the courts should require bonds in only the most extreme cases.[158] If a bond is required frequently, many private citizens might be deprived of the judicial hearing of grievances that EPA statutory standing is intended to provide.

It is apparent that the ambiguities in the statute will thrust upon the courts the responsibility to determine the scope of protection conferred by the EPA.[159] Judicial construction of the EPA either will cripple the Act or forge it into an effective system of checks and balances on the bureaucracy charged with regulation of the environment.

### *C. EPA Litigation in Florida*

Only three Florida EPA cases have yet reached the appeals court

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153. *Id.* at 449.

154. Morrill v. Edward Ball Wildlife Foundation, Inc., No. 401 (Fla. 2d Cir. Ct. July 2, 1973), *aff'd*, No. U-29 (Fla. 1st Dist. Ct. App. May 12, 1974).

155. The verified complaint was filed with the Trustees on February 11, 1973. This complaint was amended on March 30, 1973, and again in late April. The pretrial conference order was issued on May 4, 1973. There was no mention by the trial judge that an additional 30 days had to expire before judicial proceedings could begin.

156. FLA. STAT. § 403.412(2)(f) (1973).

157. Morrill v. Edward Ball Wildlife Foundation, No. 401 (Fla. 2d Cir. Ct. July 2, 1973), *aff'd*, No. U-29 (Fla. 1st Dist. Ct. App. May 12, 1974).

158. In some cases, of course, the plaintiff's cause of action may be so tenuous that justice will require that he post a bond.

159. *See* notes 130-33 and accompanying text *supra*.

level. Two of those cases reflect judicial willingness to broadly interpret the Act.[160] *Orange County Audubon Society v. Hold*[161] held that the Audubon Society, an incorporated conservation organization, was a citizen within the meaning of the Act; therefore the Society was found to have standing to sue under the EPA. The court recognized that the language of the statute "evinces a legislative intent to make enforcement of environmental laws and to make restraint of violations thereof a responsibility of the government *as well as* the citizenry." The opinion concluded that "[t]o treat a corporation as a 'citizen' is consistent with . . . the 'intent to be gathered from the context and the general purpose of the whole legislation.' "[162]

In *Save Our Bay, Inc. v. Hillsborough County Pollution Control Commission*,[163] a nonprofit organization also was found to have a cause of action against a governmental agency that had allowed a private company to pollute recreational waters.[164] Furthermore, plaintiff was not required to show a special injury.[165] *Audubon Society* and *Save Our Bay* both had been dismissed for lack of standing by the trial courts.[166] The reversals by the appellate courts seem in agreement with the Massachusetts case[167] that distinguished between standing and jurisdiction, and found the standing question to be resolved by the express language of the statute.[168] The Massachusetts court felt that the real question presented was whether the lower court had jurisdiction.[169] In other words, a court should search the pleadings to determine whether there is an alleged violation of a law, rule or regulation for the protection of air, water or other natural resources.[170] If such a violation is pleaded by the plaintiff, then the trial court has jurisdiction.

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160. Save Our Bay, Inc. v. Hillsborough County Pollution Control Comm'n, 285 So. 2d 447 (Fla. 2d Dist. Ct. App. 1973); Orange County Audubon Soc. v. Hold, 276 So. 2d 542 (Fla. 4th Dist. Ct. App. 1973). The third case under the Florida EPA, Morrill v. Edward Ball Wildlife Foundation, No. U-29 (Fla. 1st Dist. Ct. App. May 12, 1974), adds little to EPA case law because the per curiam opinion merely affirms the lower court's holding. *Ball* may be precedent for restrictive interpretation of the Act, since the trial court dismissed the EPA complaint and construed the EPA rather narrowly. *See* Morrill v. Edward Ball Wildlife Foundation, No. 401 (Fla. 2d Cir. Ct. July 2, 1973).

161. 276 So. 2d 542, 543 (Fla. 4th Dist. Ct. App. 1973).

162. *Id.*

163. 285 So. 2d 447 (Fla. 2d Dist. Ct. App. 1973).

164. *Id.* at 449.

165. *Id.*

166. 276 So. 2d at 543; 285 So. 2d at 448.

167. City of Boston v. Massachusetts Port Authority, 308 N.E.2d 488 (Mass. 1974).

168. *Id.* at 493; *see* notes 73-82 and accompanying text *supra*.

169. *See* 308 N.E.2d at 493.

170. *See* FLA. STAT. § 403.412(2)(a)(1) (1973).

### *D. Proposed Revisions of the EPA*

The Committee on Environmental Protection (CEP) has proposed revision of Florida's EPA to clarify some present ambiguities and to preclude judicial imposition of limitations.[171] The proposed bill provides in part that a "person" can sue for "declaratory and equitable relief," a change from the provision that now limits any "citizen" to "injunctive" relief; the special injury rule is expressly abrogated; a "notarized statement" replaces the "verified complaint"; the bond requirements are amended to conform to the Florida Rules of Civil Procedure.[172] These revisions would clarify ambiguities in the EPA, and should foreclose the possibility of a judicial construction of the Act that would vitiate its utility to environmentally concerned plaintiffs. Indeed, the outcome of *Save Sand Key*[173] makes the favorable resolution of the EPA special injury question paramount. If the special injury rule is applied to EPA actions, then citizens' suits to abate environmental destruction will be futile in most cases. The *Save Our Bay* court refused to saddle EPA litigation with common law special injury requirements,[174] and such a holding seems consistent with the intent of the Act. Nevertheless, *Save Our Bay* in part relied on the overruled Second District Court of Appeals decision in *Save Sand Key*,[175] which discarded the special injury rule for most environmental causes of action brought by private citizens.[176] Therefore a legislative rejection of the special injury requirement for EPA actions may be appropriate.

Neither *Save Our Bay* nor *Audubon Society*,[177] however, suggests an immediate need to change "citizen" to "any person" since in each of those cases the court interpreted "citizen" to include nonprofit corporations. Furthermore, it would be of questionable value to confer standing on nonresidents of Florida to litigate Florida's environmental issues. Restricting the statutory grant of standing to citizens of Florida helps ensure that plaintiffs in EPA actions will have some personal stake in the outcome of the case. State citizenship guarantees that the plaintiff will at least claim residency in the state where the environmental injury is occurring. Additionally, a citizen-plaintiff is more likely to have suffered injury in fact.[178] Of

171. Fla. H.R. 173 (Comm. Substitute 1974).

172. *Id.*

173. No. 44,402 (Fla. June 12, 1974).

174. 285 So. 2d 447 (Fla. 2d Dist. Ct. App. 1973).

175. Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572 (Fla. 2d Dist. Ct. App. 1973), *rev'd*, No. 44,402 (Fla. June 12, 1974).

176. 285 So. 2d at 449.

177. *See* 276 So. 2d at 543.

178. United States v. SCRAP, 412 U.S. 669, 687 (1973), and Sierra Club, Inc. v. Morton, 405 U.S. 727, 734-35 (1972), determined that an injury to many is no less

course, national environmentalist groups[179] may be more adequately funded, and thus in a better position to meet the solvency requirement. A national group, however, could at least arouse state or local interest if the natural resources are truly in need of protection by an EPA suit.

The proposed revision of the EPA favorably responds to the "citizen-person" dilemma. The revision affords a cause of action to "persons,"[180] thus clearly providing standing for corporations. At the same time, however, the revision requires that the "person" be a resident of Florida,[181] thereby ensuring that local interests will be at issue in EPA litigation. This proposal appears to offer the wisest solution to the interpretive problems.

## IV. CONCLUSION

The traditional practice of placing the enforcement of environmental laws in the hands of administrative agencies seems unwise for at least three reasons. First, there is a great potential for abuse in vesting any body with such a sweeping mandate over so important a concern. Secondly, such a practice seems to conflict with the checks and balances system that is basic to American government. Finally, the avenue for increased citizen input into the management of the environment effectively can be barred by bureaucratic procedures. The Florida Environmental Protection Act of 1971 marks the end of the traditional practice. The citizenry, through EPA causes of action, is afforded henceforth a voice in environmental management. Moreover, by means of EPA litigation the judiciary can police environmental regulations and participate in environmental protection. Such judicial

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deserving of judicial review than is a special injury. In order to establish standing, however, a party must allege that he has been injured in fact. 405 U.S. at 734-35. A mere claim of special interest in the lawsuit is not enough. 412 U.S. at 685. Injury in fact to a legal interest must occur to ensure that the plaintiff will have a sufficient personal stake in the outcome of the case. *Id.* at 687; 405 U.S. at 732-33. The state citizenship requirement of the Florida EPA helps ensure that this injury in fact requirement is met, because the plaintiff will at least be a Floridian. Thus he will have a minimum degree of particularized interest in the alleged environmental damage that he claims is occurring within the state. Opening the court to EPA action by non-residents could generate litigation by groups with no interest whatsoever in the state except for a general interest in environmental protection. This general interest may not constitute a sufficient personal stake to ensure that the group presents the dispute in an adversary context. If this did occur and an outside group were to lose an EPA action because it failed adequately to present its case, then the doctrine of collateral estoppel might prevent others from bringing subsequent EPA action. *See* FLA. STAT. § 403.412(4) (1973).

179. *E.g.*, National Sierra Club or the Audubon Society.

180. Fla. H.R. 173 (Comm. Substitute 1974).

181. *Id.*

intervention in the environmental regulatory scheme should ensure that environmental protection legislation is effectively and efficiently enforced, and effective enforcement of environmental laws is the key to furthering the constitutional policy of protecting and preserving Florida's natural resources and scenic beauty. Thus, the EPA is the linchpin of the environmental protection scheme because it helps guarantee that environmental regulations will be observed. When called upon to construe the EPA, it is therefore important that the courts read the statute in the broad manner that will comport with its significance and purpose.

PATRICIA A. RENOVITCH